No. 10,082.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GERMAIN SEED AND PLANT COMPANY,

Respondent.

CONSOLIDATED SEEDSMEN'S UNION, INC.,

Intervenor.

BRIEF OF INTERVENOR CONSOLIDATED SEEDSMEN'S UNION, INC.

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TABLE OF AUTHORITIES CITED.

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Jurisdiction.

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against the respondent, Germain Seed and Plant Company, pursuant to Section 10(c) of the National Labor Relations Act (49 Stat. 449 (1935)), 29 U. S. C. Secs. 151-166. [Supp. II. 1926.]

The jurisdiction of this court is based on Section 10(e) of the Act. The Intervenor in this case is the Independent Union sought to be dissolved and disestablished by order of the National Labor Relations Board and the

Intervenor, Independent Union, respectfully asks permission of this Court to file its brief and to intervene in this matter that it may be heard and, while this comes at a late date, it will more fully appear by the affidavit in support of its motion to intervene, that the said Independent Union had no proper notice and therefore comes into court at this late date. The Independent Union realizes that such an order, if sustained, will sound its death knell and therefore respectfully asks permission to be heard.

In the interest of brevity we respectfully ask that the brief of the respondent Germain Seed and Plant Company may also be considered in support of our position and we will not herein reiterate anything therein said.

Statement of the Case.

We respectfully ask that the statement of the case in the respondent's brief may be considered as a statement of the case in so far as it applies to the intervenor, with the following addition that, as hereinbefore set forth, we come into Court at this late date because of the fact that no proper notice was ever served upon the Independent Union so far as its officers know and until they received a letter under date of August 31, 1942 from the National Labor Relations Board which said letter is set forth in the affidavit in support of the Motion to Intervene, the Independent Union was not advised that these appellate proceedings were pending, and immediately thereafter, as set forth in the affidavit, the Independent Union, your intervenor, sought out counsel of its own choosing with the purpose of attempting at this late date to protect its interests.

ARGUMENT.

The Board's Findings of Fact From Which it Concludes Respondent Has Violated Sections 8(1) and (2) of the Act Are Not Supported by Substantial Evidence.

The Independent Union, your intervenor, respectfully asks that the argument advanced in respondent's brief be considered in its behalf and in addition thereto will urge the following in support of its position: That the Board's findings of fact are not supported by substantial evidence.

The respondent's brief contains a concise and thorough statement of the facts with the exception of a more complete resumé of the testimony of the Independent Union's then attorney, Mr. Voorhees, which testimony is set out more fully hereinafter. We do, however, respectfully point out to your Honors, the case of *National Labor Relations Board v. Standard Oil Company, a corporation, et al.,* decided November 11, 1941, by the United States Circuit Court of Appeals, Tenth District, cited in C. C. H. Labor Cases, Vol. 5, 60751; 124 Fed. (2d) 895. In that case the facts, briefly, were that there had been in existence what was known as "The Plan," but after the Wagner Act's constitutinality had been established by the courts, this organization was disestablished by the Company; that that organization had been supported and aided by the Company there was no doubt; and thereafter certain employes of the Company set about forming an organization of their own and, as was said by the Court in its review of the evidence:

> "While the initial organizational meeting was held on April 27, 1937, the employees, in working out

their new Employees' Organization proceeded deliberately. The By-Laws were not adopted until May 4, 1937. Officers and directors were not elected until May 7, 1937, and it was not until August 19, 1937, that a majority of the employees decided to join the Association and employ it as their bargaining representative. In the period that intervened Standard maintained a neutral attitude and followed the 'hands off' policy. The record is devoid of any proof that Standard, from April 27th to August 19th in anywise encouraged membership in the Association or interfered with its management. There was some evidence that Astin, who possessed some supervisorial authority but no power to hire, discharge or discipline, solicited a few members for the Association on the plant during working hours. There was no evidence that the Standard had knowledge thereof. Standard had instructed its officers and supervisorial employees to refrain from any labor organization activities and to maintain a neutral attitude; had prohibited solicitation of membership on the plant during working hours, and had publicised that fact by notice on the bulletin board. This isolated act of Astin, neither authorized nor encouraged by Standard, and in violation of its express instructions, ought not to be imputed to Standard (citing National Labor Relations Board v. Whittier Mills Co., 111 Fed. (2d) 474-479; E. I. Dupont de Nemours & Co. v. National Labor Relations Board, 116 Fed. (2d) 388 at 400), and affords no ground, we think, for the annihilation of a labor organization freely organized by the employees, and freely chosen by a majority of them as their bargaining representative."

In the *Standard Oil* case, *supra,* the Court had this further comment to make upon the rights granted to workers by the Act:

> "The Act guarantees to the employees the right to self-organization, to form or join a labor organization, and to bargain collectively through representatives of their own choosing. This freedom of choice embraces both local and affiliated organizations and where the employees freely choose a local organization, it is not either for the Board or us to say whether they choose wisely or otherwise (citing cases: National Labor Relations Board v. Newport News S. & D. D. Co., 308 U. S. 250).
>
> "Standard employees had the right to form the Association and to join the same immediately after the disestablishment of the Plan. (Citing cases: Humble Oil & Refining Co. v. National Labor Relations Board, 113 F. (2d) 85, 88; Brown Paper Mill Company, 108 F. (2d) 867, 871; Magnolia Petroleum Co. v. National Labor Relations Board, 112 F. (2d) 545, 552.)"

In the case of *National Labor Relations Board v. Standard Oil Company, supra,* the court had this further to say with reference to findings of the Board and how they must be supported:

> "Section 10(e) of the Act provides: 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' This means 'evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reason-

ably inferred.' 'Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' 'It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' (Citing cases: National Labor Relations Board v. Columbian E. & S. Co., 306 U. S. 292, 299; Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197; Continental Oil Co. v. National Labor Relations Board, 113 Fed. (2d) 473, 481.)

"'When the evidence is consistent with either of two inconsistent hypotheses, it establishes neither.' (Citing cases: Nevada Consolidated Copper Corporation v. National Labor Relations Board, 122 F. (2) 587; Bussmann Mfg. Co. v. National Labor Relations Board, 111 F. (2) 783, 787; Cupples Co. Manufacturers v. National Labor Relations Board, 106 F. (2) 100, 114."

We sincerely urge that the evidence in this case not only does not support the findings of the Board, but we urge that the evidence shows affirmatively that this Independent Union was, in truth and in fact honestly organized, honestly and independently conducted, and is entitled to live. It appears that the officers and all members were fully advised of the import of the Wagner Act, and independently acted at all times. In fact the president, who was elected at the organization of the Independent Union, even purchased a copy of the Act [R. 536]. There is evidence that employees who were thought to be

in a supervisory capacity, were ousted [R. 672, 676, 677, 680, 682]. There is evidence that the officers were particularly active in attempting to learn and know all they could with reference to the operations of such unions in order that they might better discharge their obligations to their members; and at one time one group of officers even met with a previous group in the hope that they might better learn the problems that confronted them [R. 567, 568].

As proof of the substantially independent character of the Independent Union, we direct your Honors' attention to the demands made by the Independent Union that it be granted a closed shop, which were pressed diligently [R. 259, 260, 557, 561]. The only conclusion that could be reached, that is to say reasonable conclusion, from such testimony and evidence, is that in truth and in fact the intervenor was an independent union demanding for its membership those things to which they thought they were entitled, and no doubt a serious conflict ensued between the independent union and the respondent. Had the respondent, in truth and in fact, dominated the Independent, no such demand would ever have been made upon the respondent. There is no other reasonable deduction to be reached.

The Independent Union not only attempted to further the interests of its membership and conducted repeated negotiations with the management, but did in fact make considerable progress for its membership. [See R. 358, 359; 350, 351; 622, 623; 637, 638; 364, 365; 623; 340, 341; 360, 361; 349; 519; 602, 603; 589, 590; 592, 594.] As a result of all of these activities substantial gains were made by the Independent Union.

In further support of our contention that there is no substantial evidence to justify the findings of the Board, we respectfully direct your attention to the testimony of J. P. Voorhees, found at page 209 of Volume 1 of the transcript of record. Mr. Voorhees testified that he was an attorney in the City of Los Angeles, and testified with reference to the organization of the intervenor Independent Union, the pertinent parts of his testimony in our opinion being as follows:

> "Q. Do you recall this meeting as to which he testified that you were present and spoke? A. You mean the meeting at the warehouse?
>
> Q. Yes. A. Yes, I remember that.
>
> Q. Do you remember what you said at that time? A. In general, yes. Specifically, no.
>
> Q. Well, what was the substance of what you said? A. The substance of what I said was that the employees had a right to form or join any union that they pleased, without the employer having any voice in the matter, and that they had a right to belong to any organization that they might desire, that they could form an independent union if they wished and that there were some independent unions in Los Angeles at that time; and that the dues in an independent union were considerably smaller than the dues in other unions, and that they would be able to control and operate their union without the aid of any business agent or outside help, and that if they would form such an independent union, I would advise them to form under the non-profit corporation laws of this state, so that none of them would be personally liable for any of the debts of the organization or any liabilities of the organization.

Q. Is that all you said, as you recall, or the substance of what you said? A. Well, I believe that my memory was refreshed by the testimony of this last witness. I believe I told them that the only persons eligible to belong to a union were the workers, and that those who had the right to hire or fire or discipline employees, or who were in executive positions, did not have the right to belong to any union. And I believe that someone at that time did define his duties to me, and I informed him that he was not eligible to belong to the union and should not participate in that meeting. I have just a hazy recollection of that, which was refreshed entirely from this last witness' testimony.

Q. Do you recall whether or not you were the only speaker at this meeting? A. On that point I also have a hazy recollection, and I would say, with qualifications, without being certain, that Mr. Stratton was present and spoke. What he said I have no recollection at all.

Q. Can you identify Mr. Stratton any further, as to the position he held at that time? A. Mr. Stratton at that time was the secretary and business agent of the independent union at the Cudahy Packing plant.

Q. You don't recall what Mr. Stratton said? A. I do not.

Q. Do you recall anything of what he said? A. Very hazily. I think he told them something about the way in which the independent union at Cudahy's was being operated.

Q. Mr. Voorhees, do you recall anything of the Hill Street store meeting, which was referred to in the testimony of Mr. Sage? A. Yes. The Hill Street store meeting was called after the articles of

incorporation had been signed and sent to Sacramento and were returned, and I believe after the by-laws had been adopted by the incorporators, and was called for the purpose of explaining to the employees what had been done by the incorporators and to let them determine whether they wished to become members of the organization, to explain to them the by-laws and to permit them to decide whether they wished to join.

I recall that someone in the group—at that time there were far more employees present than were present at the meeting in the warehouse—and at that time someone asked the same question, as to who was eligible to belong to the union, and I gave them the same answer, that a person who had the right to hire or fire or to discipline employees or who was in an executive position could not belong to the union. And several of them, I believe, contended that Mr. Sage was in that position, and I stated that since they felt he was in that position or occupied some position of that character, that he had no right in the meeting whatsoever, and I asked him to leave the meeting and leave the building, I believe.

Q. Do you recall whether or not you excluded anyone else? A. I don't know that I did, but I can't recall positively. It seems to me that there was one other person who placed himself or who thought he might be in that category; one or two others. Now, I can't remember.

Q. Do you recall who presided at this Hill Street store meeting? A. Well, Mr. Sage introduced me and I started explaining the articles and by-laws, and then someone raised this question. I believe one of the incorporators presided.

Q. Mr. Frauenberger? A. Well, I say yes, with qualifications. I can't remember his name, but someone—

Q. Do you recall what he looked like? A. No, I don't.

Q. Mr. Voorhees, do you recall whether or not at the conclusion of this Hill Street store meeting an election was held? A. I don't recall of any election being held. It seems to me that there was a motion of some sort to accept the by-laws or to approve the by-laws and to become members of the organization.

Q. You don't remember whether or not there was any election? A. Of officers, do you mean?

Q. No, of accepting the union. A. Well, as I say, I think there was a motion—

Q. Yes. A. —to the effect that the acts of the incorporators be approved, and that the by-laws be approved, and that they become members of the organization. I think the minutes would speak for themselves. At least, they should. There should be a record there, should be minutes of that meeting. In fact, I think I found the minutes a moment ago when I was looking in the minute book.

Q. (By Mr. Cobey): Mr. Voorhees, am I to understand that you acted as attorney for this union throughout the period of its establishment? In other words, you handled the legal end of the setting up of this union? A. Well, your question isn't quite clear. What I think you mean is this: Was I retained by them all of the time?

Q. Yes. A. No, I was not. I was employed to draw up their articles of incorporation and their by-laws, and to explain the by-laws and the articles, and on two or three occasions thereafter some of-

ficer or director of the corporation talked with me. I believe on one occasion or two occasions the Board of Directors came to my office and consulted with me. I did not consider I was retained as their attorney. They, as occasion required, saw fit to consult with me further.

Q. Well, did you or did you not draft the articles and the by-laws for the union? A. Oh, yes.

Q. And the other organizational documents? A. Well, what do you mean by 'other organizational documents'?

Q. Well, I show you Board's Exhibit 3, for identification, headed 'preorganization agreement.' Do you recall whether or not you drafted that? A. I believe that I did. I believe that I drafted the portion appearing above the signatures."

We next direct your attention to Board's Exhibit 3, found on page 216 of the transcript of record, Volume 1, which was a preorganization agreement. Then on page 217 of the transcript of record, Volume 1, will be found the Articles of Incorporation, and on page 218 are specifically set out the purposes for which the corporation was organized. On page 221 will be found the Minutes of the First Meeting of Incorporators, and on page 222 the First Meeting of the Directors.

All of such testimony by the attorney Voorhees demonstrates without contradiction that the formation of the Independent Union was a voluntary act upon the part of those seeking to set up this union,—namely, the workers in respondent's plant: and they were properly and honestly advised as to what the law was, and acted accordingly.

Conclusion.

We respectfully submit that the evidence is not sufficient to sustain the findings of the Board, and that the order of the Board should be reversed and not enforced.

Respectfully submitted,

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